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Supreme Court, U.S.
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In The

Supreme Court of the United States

TOD FRIEDMAN,

Petitioner,

vs.

WARDEN JIMMY STEGALL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED MR. FRIEDMAN'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHICH CONTAINS NON-FRIVOLOUS ISSUES AND WHICH WERE ADDRESSED ON THE MERITS BY THE DISTRICT COURT.

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United States District Court Judge Gerald Rosen denied Mr. Friedman's Petition for Writ of Habeas Corpus and entered a Judgment against him on September 29, 1999, Judge Rosen denied Mr. Friedman's request for a certificate of appealability in an Order dated December 23, 1999. These decisions are unpublished dispositions, attached as Appendices B, C and D, respectively.

The United States Court of Appeals for the Sixth Circuit denied Mr. Friedman's request for a certificate of appealability on March 3, 2000. This unpublished Order is attached as Appendix A.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), as Mr. Friedman is seeking review of a decision denying him relief from the United States Court of Appeals for the Sixth Circuit. *See also Hohn v. United States*, 118 S. Ct. 1969 (1998).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1). Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2253(c). Appeal.

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

This petition seeks review of a decision denying Mr. Friedman a certificate of appealability in this habeas corpus action. Mr. Friedman originally filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan on November 4, 1998. The petition was accepted for filing and an Order requiring a responsive pleading from the Respondent Warden was issued on November 6, 1998. The petition raised the following issue:

WHERE THE TRIAL COURT FAILED TO INSTRUCT THE JURY AS TO AN ESSENTIAL ELEMENT OF THE CRIME CHARGED, PETITIONER WAS DEPRIVED OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND SHOUD BE GRANTED A WRIT OF HABEAS CORPUS.

The response to the petition was filed on May 5, 1999. The petition was denied by United States District Court Judge Gerald Rosen on September 29, 1999. The Order and Judgment denying the habeas corpus petition are attached as Appendices B and C, respectively. Thereafter, Judge Rosen denied Mr. Friedman's request for a certificate of appealability. This Order is attached as Appendix D.

The United States Court of Appeals for the Sixth Circuit denied Mr. Friedman's application for a certificate of appealability in an Order dated March 3, 2000. This Order is attached as Appendix A.

Mr. Friedman asserts that he is entitled to proceed on appeal to the United States Court of Appeals for the Sixth Circuit with his habeas corpus petition, and he seeks certiorari to this Court for permission to do so.

ARGUMENT

I. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED MR. FRIEDMAN'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHICH CONTAINS NON-FRIVOLOUS ISSUES AND WHICH WERE ADDRESSED ON THE MERITS BY THE DISTRICT COURT.

Petitioner filed his application for a writ of habeas corpus on November 4, 1998. On November 6, 1998, the United States District Court for the Eastern District of Michigan issued an Order requiring Respondent to file responsive pleadings. On September 29, 1999 the District Court issued an Opinion and Order and Judgment dismissing the habeas corpus petition. Petitioner thereafter filed a timely Notice of Appeal, and a request for a certificate of appealability in this matter.

The issue Petitioner raised in his application for a writ of habeas corpus in the District Court made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2). In support of this claim, Petitioner points to the fact that when the petition for a writ of habeas corpus was filed, the District Court expressly stated that the case was not subject to summary dismissal, and issued an order directing service upon the Respondent Warden on November 6, 1998.

In *Alexander v. Harris*, 595 F.2d 87 (2nd Cir. 1979), the standard for issuance of a certificate of probable cause

was linked to the standard for denying summary dismissal. Under the amendments to the habeas corpus statute pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, the certificate of probable cause was replaced by the certificate of appealability. However, several courts have expressly recognized that the standard for the issuance of a certificate of appealability is the same as the standard for the issuance of a certificate of probable cause. *See Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir. 1997) [overruled on other grounds by *Lindh v. Murphy*, 117 S. Ct. 2059 (1997); and overruling recognized by the Sixth Circuit on the limited issue of non-retroactivity of the AEDPA in *Arrendondo v. United States*, 120 F.3d 639, 640 n.1 (6th Cir. 1997)]; *Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997); *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997).

The second point of evidence which demonstrates that Petitioner's claim makes a substantial showing of the denial of a constitutional right is the fact that the District Court devoted a number of pages to the merits of his habeas claim, and did not deny this claim as frivolous. The certificate of appealability should have been granted under 28 U.S.C. § 2253(c)(2).

In addition to the fact that the District Court erroneously denied Petitioner's request for a certificate of appealability, the Sixth Circuit also improperly denied the request in lieu of a recent opinion that they decided in favor of a petitioner who presented a similar claim to the one raised in Mr. Friedman's petition. In *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999) the Court found a due process violation occurred when incomplete instructions were

given to the jury. At a minimum, the certificate of appealability issue should be remanded to the Sixth Circuit for a determination of the relevance of the *Barker* holding and its implications in Mr. Friedman's case.

In keeping with the policy that the certificate of appealability is designed to bar frivolous appeals, and not to preclude appellate review of cases involving substantial issues, this court should **GRANT** the within request for a certificate of appealability. This is especially so where, had the District Court opinion gone the other way, the government would be able to appeal that decision on the merits, without having to request a certificate of appealability. *See* F.R.A.P. 22(b)(3).

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Petitioner asks this Honorable Court to grant certiorari in this case, because the statutory amendments to 28 U.S.C. § 2253(c) have created confusion in the application of the standard for certificates of appealability, ***which is an issue that can only be settled by this Court.***

Respectfully submitted,

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APPENDIX A

No. 99-2149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOD FRIEDMAN,
Petitioner-Appellant,
v.
JIMMY STEGALL,
Respondent-Appellee.

ORDER

(Filed Mar. 3, 2000)

Before: MARTIN, Chief Judge.

Tod Friedman, a Michigan prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The filing of the notice of appeal has been construed as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b).

Upon review, the court denies the application for a certificate of appealability as to all issues.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green, Jr.
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TOD FRIEDMAN,

Petitioner,

vs.

JIMMY STEGALL,

Respondent.
_____/

Case No. 98-CV-74769

Honorable
Gerald E. Rosen

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner, Tod Friedman, a state prisoner currently confined at the Macomb Regional Correctional Facility in New Haven, Michigan, has filed a pro se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, Petitioner's application is denied and the matter is dismissed.

II. Factual Background

Vicki Hayes testified that on November 18, 1991, she responded to an advertisement in the local paper that read "escort service seeking men and women. Huge income." Petitioner answered the phone by saying "ADVO," an acronym for Adult Dance Vogue Organization. Ms. Hayes scheduled an interview with Petitioner for that evening. Ms. Hayes appeared at the address,

which was an apartment. At Petitioner's request, Ms. Hayes provided Petitioner with her driver's license and social security card. Petitioner told her the position paid fifty dollars an hour plus tips and that there were also positions available for topless dancers and strippers. Petitioner then questioned Ms. Hayes about her sexual preferences, martial [sic] status and other personal information, writing the information down on an index card. Ms. Hayes asked if the job involved sex; Petitioner replied yes. Petitioner grabbed Ms. Hayes about her private areas, asking her whether she considered that "aggressive behavior." Petitioner then asked Ms. Hayes to take off her clothes so he could examine her body for any scars or tattoos. Ms. Hayes declined and told him that she had to leave. Petitioner appeared upset and told her that the position might not be open at a later date.

Ms. Hayes left the apartment and drove to a nearby mall to find a telephone and report the incident. She encountered Officer Kathy Vonk, to whom she gave Petitioner's address and explained what had transpired during the interview. Officer Vonk contacted an officer in the Special Investigation Unit, who requested that Officer Vonk call the number and schedule an interview. Officer Vonk was further instructed to have Officer Laura Anderson accompany her to the interview.

Officer Vonk testified[1] that she and Officer Anderson went undercover to the apartment for the interview later that same evening. Upon arrival, the officers saw a

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[1] Officer Anderson's testimony was substantially the same as Officer Vonk's.

woman exciting [sic] the apartment. Petitioner asked for Officer Vonk's identification, which she provided. Officer Vonk explained that she brought her friend along (Officer Anderson), who might also be interested in the escort position. Petitioner then asked Officer Vonk her measurements, approached her and tried to unbutton her pants. When Officer Vonk resisted, Petitioner replied that she would "get used to that in this business." Petitioner stated he was going ask some personal questions about the "s" word. Petitioner proceeded to ask Officer Vonk about her sexual preferences, writing the information down on an index card. Petitioner would not indicate exactly what was expected to transpire on an escort date, stating he would be at a "legal risk" and that it could make him "Federally indictable." He also explained that "if you do not like sex this job is not for you" and that for one hundred and fifty dollars an hour, fifty of which the escort kept, they "were not there to play tiddlywinks." Petitioner also asked Officer Vonk to remove her clothes. Officer Vonk declined and the officers left, stating they would have to think about the position.

The officers returned to the apartment about a half an hour later to inquire further about the position. Petitioner appeared upset at their return. Petitioner showed the officers an article about a prostitute having been arrested and pointed out that she only charged twenty dollars an hour. Petitioner reiterated that if they were uncomfortable about sex, they should look for another job.

Petitioner testified that he ran an escort company that also employed topless dancers and strippers. He stated he never told the women that they had to engage in sexual acts for the position. He further testified that he

never offered any of the women a job or suggest they become prostitutes. Petitioner also stated that to the extent that his testimony differed from the witnesses as to what he said during the interview, he indicated that the witnesses were either lying or mistaken.

III. Procedural History

Petitioner was convicted by a jury of three counts of pandering, M.C.L. § 750.455. Petitioner was subsequently sentenced to two to twenty years imprisonment. Petitioner filed a direct appeal, raising the following issues:

I. Did the trial court err in denying the defendant's motion for a directed verdict?

II. Did the trial judge err in permitting the prosecutor to use previously excluded, illegally obtained evidence, during the cross-examination of the defendant?

The Michigan Court of Appeals affirmed Petitioner's conviction in an unpublished memorandum opinion. *People v. Friedman*, Nos. 153653; 153804, (Mich. Ct. App. Feb. 18 1994). Petitioner did not file an application for leave to appeal in the Michigan Supreme Court.

Thereafter, Petitioner, through new counsel, filed a motion for relief from judgment, contending that the trial court erred in failing to instruct the jury on the intent required to convict him of pandering. The trial court denied the motion in a written opinion. *People v. Friedman*, No. 92-26609; 92-26719 (Washtenaw Cir. Ct. Dec. 4, 1996). The Michigan Court of Appeals denied leave to

appeal for "failure to establish entitlement to relief pursuant to M.C.R. 6.508(D)(3)." *People v. Friedman*, No. 200165 (Mich. Ct. App. May 1, 1997). The Michigan Supreme Court similarly denied leave to appeal, citing M.C.R. 6.508(D). *People v. Friedman*, No. 109532 (Mich. Feb. 27, 1998).

Petitioner filed the instant petition for a writ of habeas corpus on November 4, 1998, raising the following issue:

> I. Where the trial court failed to instruct the jury as to an essential element of the crime charged, Petitioner was deprived of his federal constitutional right to due process and should be granted a writ of habeas corpus.

IV. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 26, 1996) govern this case because Petitioner filed his habeas application after the effective date of the AEDPA. *Lindh v. Murphy*, 521 U.S. 320 (1997). The AEDPA altered the standard of review that a federal court must use when reviewing applications for writs of habeas corpus. 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The United States Court of Appeals for the Sixth Circuit recently discussed the deference to be accorded to a state court's decision on habeas review. The Sixth Circuit has defined an "unreasonable application of clearly established Federal Law" under 28 U.S.C. § 2254(d)(1) as follows,

> the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be debatable among reasonable jurists, if it is so offensive to existing precedent, so devoid of record support, or so arbitrary as to indicate that it is outside the universe of plausible, credible outcomes.

Nevers v. Killinger, 169 F.3d 352, 362 (6th Cir.), *cert. denied,* ___ U.S. ___, 119 S. Ct. 2340 (1999) (internal citations omitted). *See also, Tucker v. Prelesnik,* 181 F.3d 747 753 (6th Cir. 1999).

Additionally, a federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. 28 U.S.C. § 2254(e)(1); *Warren v. Smith,* 161 F.3d 358, 360-61 (6th Cir. 1998), *cert.*

denied, ___ U.S. ___, 119 S. Ct. 2403 (1999); *Harris v. Stovall*, 22 F.Supp. 2d 659, 663 (E.D. Mich. 1998).

V. Analysis

Respondent contends that Petitioner's claim is procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Rust v. Zent*, 17 F.3d 155, 162 (6th Cir. 1994).

The doctrine of procedural default applies where there is a firmly established state procedural rule applicable to the petitioner's claim and the petitioner failed to comply with it. *Rust v. Zent*, 17 F.3d at 160; *Warner v. United States*, 975 F.2d 1207, 1213-14 (6th Cir. 1992), *cert. denied*, 507 U.S. 952 (1993). Further, the last state court from which the petitioner sought review must have invoked the procedural rule as a basis for its decision to

reject review of petitioner's federal claim. *Coleman*, 501 U.S. at 729-30. If the last state court judgment is an unreasoned order simply affirming the conviction, the federal court should look through the last order and examine the preceding reasoned order. If that opinion explicitly relies on the procedural default, the federal court should presume that the last state court judgment likewise relied on the bar. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Rust v. Zent*, 17 F.3d at 161.

The last state court that produced a reasoned judgment of Petitioner's jury instruction claim was the trial court on collateral review. The trial court held that because Petitioner failed to raise the jury instruction issue in his appeal of right, his claim was subject to the requirements of M.C.R. 6.508(D)(3). M.C.R. 6.508(D)(3) precludes relief, absent good cause and actual prejudice, under a motion for relief from judgment if the movant could have raised grounds for relief on appeal or in prior motion. This court rule was firmly established and regularly followed when Petitioner filed his motion for relief from judgment. The trial court's dismissal of his claim was therefore based on adequate and independent state procedural rule, restricting federal habeas corpus review of claims. MCR 6.508(D)(3). *See Jones v. Toombs*, 125 F.3d 945, 947 (6th Cir. 1997) (holding that MCR 6.508(D)(3) is an adequate, independent state rule barring habeas review as applied to defaults occurring after the rule's enactment).

Having determined that Petitioner's claim is procedurally defaulted, Petitioner must either satisfy the cause and prejudice test or show manifest injustice in order to be entitled to habeas review. Petitioner claims

defense counsel's ineffectiveness constitutes cause. The Supreme Court has held that "cause" under the cause and prejudice standard must be "something external to the petitioner, something that cannot fairly be attributable to him." *Coleman*, 501 U.S. at 753. The Supreme Court further held that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error. . . . Attorney error that constitutes ineffective assistance of counsel is cause, however." *Id.* at 753-54 (internal citations omitted). Therefore, where a habeas corpus petitioner asserts ineffective assistance of counsel as "cause" for procedural default, the federal reviewing court must determine whether counsel's performance was constitutionally deficient under the standard set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

Strickland requires that a petitioner first prove that counsel's performance was deficient. This "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Second, a petitioner must show that counsel's deficient performance prejudiced petitioner. A petitioner may establish prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* Prejudice also requires that a petitioner show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. The Sixth Circuit, applying the *Strickland* standard, has held that a reviewing court therefore must

focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied* ___ U.S. ___, 117 S. Ct. 2536 (1997).

Petitioner contends that the trial court's failure to instruct the jury on the element of intent denied him due process. Petitioner claims that trial court's omission of the intent element denied him due process because his defense was that he never intended that the women become prostitutes, but rather escorts, topless dancers or strippers. In other words, he maintained he was not knowingly obtaining prostitutes.

The Michigan statute defines the offense of pandering to encompass "[a]ny person who . . . shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute. . . . " M.C.L. § 650.455. In explaining the offense of pandering, the trial court instructed the jury as follows:

> So, the people must prove beyond a reasonable doubt that the Defendant, first in the case of Vicki Hayes, the People must prove beyond a reasonable doubt that the Defendant induced, persuaded, enticed a female, Vicki Hayes, to become a prostitute.
>
> In the other case the People must prove beyond a reasonable doubt that the Petitioner induced, persuaded, enticed a female, Kathleen Vonk, to become a prostitute.
>
> In the other case the People must prove beyond a reasonable doubt that the Petitions [sic] induced, persuaded or enticed a female, Laura Anderson, to become a prostitute

> A prostitute is a person who performs acts of sexual intercourse for money. Now violation of the statute, that is the crime charged, may be accomplished even though the actor does not successfully persuade the alleged victim to become a prostitute. It's not necessary for the claimed victim to become a prostitute.

(Trial Transcript May 20, 1992 at p. 97-8).

The Michigan Standard Jury Instructions provide:

> (1) The defendant is charged with the crime of pandering. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> (2) First, that the defendant [forced/persuaded/encouraged/tricked] . . . to be a prostitute. A prostitute is a person who does sexual acts for money.
>
> . . . .
>
> (4) Second, that the defendant did this knowingly and intentionally.

Michigan C.J.I. 2d 20.34.

In this case, the trial court did not specifically instruct the jury that Petitioner had to act "knowingly and intentionally," as stated in the standard jury instructions. To this extent, the trial court erred. Defense counsel did not object to the jury instruction nor appeal on this ground. However, defense counsel did claim on appeal that the trial court erred in denying his motion for a directed verdict and presented essentially the same argument – that Petitioner did not intend for the woman to become prostitutes. Defense counsel's decision to frame

the argument in terms of an insufficiency of the evidence claim is well within the protected realm of trial strategy. As such, counsel was not deficient in failing to raise the jury instruction issue. Petitioner has therefore failed to establish "cause" to excuse his procedural default.

Moreover, this Court finds that Petitioner has failed to demonstrate prejudice from the jury instruction. As the trial court correctly concluded, there was considerable evidence that Petitioner intended the woman becomes prostitutes. Although Petitioner never stated that the women had to become prostitutes, the statements he did make clearly indicate that was his intent. For instance, he questioned the women in detail regarding their sexual preferences. He indicated that for one hundred and fifty dollars an hour, the woman should "use their brain" to think about what would be expected. He stated that "if you don't like sex, this job is not for you." Moreover, he specifically told Vicki Haynes [sic] that the job involved sex. Based upon all of the evidence produced at trial, Petitioner cannot show that had the trial court specifically instructed the jury on the element of intent, the result would have been different. Indeed, as the trial court found, "This testimony could lead a reasonable trier of fact to conclude that the acts of the Defendant were *intended* to induce, persuade, encourage, inveigle or entice the witnesses, Vicki Hayes, Officer Kathy Vonk, and Officer Laura Anderson, to engage in acts of prostitution." *People v. Friedman*, Nos. 92-26609; 92-26719 slip op. at p. 4 (emphasis added).

Petitioner has also failed to overcome the procedural bar by establishing that a constitutional error resulted in a fundamental miscarriage of justice. *Schlup v. Delo*, 513

U.S. 298 (1995). The Supreme Court has explicitly tied the miscarriage of justice exception to procedural default to a petitioner's innocence. *Schlup*, 513 U.S. at 321. Thus, petitioner must assert a constitutional error along with a claim of innocence. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324. Ultimately, petitioner must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. Petitioner has not supported his allegations of constitutional error with new reliable evidence that was not presented at trial, and which establishes that he is actually innocent of the crime for which he was convicted.

Finally, this Court would add that even if this claim was not procedurally defaulted, Petitioner still cannot prevail on habeas review. Although the jury instruction was incomplete, not all trial errors give rise to habeas relief. The question in a habeas proceeding is whether the ailing jury instruction so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even "universally condemned," and an omission or incomplete instruction is less likely to be prejudicial than a misstatement of the law. *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977). The challenged instruction may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial court record. *Grant v. Rivers*, 920 F. Supp. 769, 784 (E.D. Mich. 1996).

Because of the substantial evidence of Petitioner's intent, the trial court's failure to include the element of intent did not deny Petitioner due process nor render the trial fundamentally unfair.

VI. Conclusion

Based upon the foregoing, **IT IS ORDERED** that the petition for a writ of habeas corpus is **DENIED** and the matter is **DISMISSED.**

/s/ Gerald E. Rosen
Gerald E. Rosen
United States
District Judge

Dated: 29 SEP 1999

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TOD FRIEDMAN,

Petitioner,

vs.

JIMMY STEGALL,

Respondent.
_____/

Case No. 98-CV-74769

Honorable
Gerald E. Rosen

JUDGMENT

The above entitled matter having come before the court on a Petition for Writ of Habeas Corpus, Honorable Gerald E. Rosen, a United States District Judge, presiding, and in accordance with the Opinion and Order entered on 29 SEP 1999, 1999;

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is, **DENIED.**

Dated at Detroit, Michigan, this _____, day of 29 SEP 1999, 1999.

DAVID J. WEAVER
CLERK OF THE COURT

BY: /s/ Illegible
DEPUTY CLERK

APPROVED:

/s/ Gerald E. Rosen
GERALD E. ROSEN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TOD FRIEDMAN,

Petitioner,

vs.

JIMMY STEGALL,

Respondent.
_____/

Case No. 98-CV-74769

Honorable
Gerald E. Rosen

OPINION AND ORDER DENYING CERTIFICATE OF APPEALABILITY

I. Introduction

Petitioner, Tod Friedman, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This court issued an opinion and order denying Petitioner's application. Petitioner has now filed a motion for a certificate of appealability. Before Petitioner may appeal this court's dispositive decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). This court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In Re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). For the reasons stated in our order denying habeas relief, Petitioner has not made the requisite showing for a certificate of appealability.

II. Analysis

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The substantial showing threshold is satisfied when a petitioner demonstrates that the issues raised are debatable among reasonable jurists, that the court could resolve issues differently, or that the questions deserve to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4. (1983); *see also Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1724 (1997).

Petitioner was convicted by a jury of three counts of pandering, M.C.L. § 750.455. Petitioner was subsequently sentenced to two to twenty years imprisonment. Petitioner filed an application for a writ of habeas corpus, raising the following issue:

> I. Where the trial court failed to instruct the jury as to an essential element of the crime charged, Petitioner was deprived of his federal constitutional right to due process and should be granted a writ of habeas corpus.

Petitioner conceded that his claim was procedurally defaulted, but alleged ineffective assistance of counsel as "cause" to excuse his procedural default. This court determined that defense counsel's failure to object to the jury instruction or raise the issue on appeal did not constitute ineffective assistance under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Although this court found that the trial court erred in failing to specifically instruct the jury that Petitioner had

to act "knowingly and intentionally," defense counsel presented essentially the same argument Petitioner asserted in this court – that Petitioner did not intend for the women to become prostitutes. Defense counsel's decision to frame the argument in terms of an insufficiency of the evidence claim, and not a jury instruction error, was well within the protected realm of trial strategy. As such, Petitioner failed to establish "cause" to overcome his procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

This court further found that Petitioner failed to demonstrate prejudice from the jury instruction, as there was substantial evidence that Petitioner intended that the women become prostitutes. Because Petitioner failed to present any evidence that he was actually innocent, he also failed to establish that a constitutional error resulted in a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298 (1995).

This court added that, even if the claim was not procedurally defaulted, Petitioner still could not prevail on habeas review. Because of the substantial evidence of Petitioner's intent, the trial court's failure to specifically articulate the element of intent did not deny Petitioner due process nor render the trial fundamentally unfair. *See Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977).

III. Concluson

Accordingly, because Petitioner has failed to make a substantial showing of the denial of a constitutional right, the motion for a certificate of appealability is **DENIED.**

IT IS SO ORDERED.

/s/ Gerald E. Rosen
Gerald E. Rosen
United States
District Judge

Dated: 23 DEC 1999

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY /s/ Illegible
DEPUTY CLERK